

No. 25-748

In the
Supreme Court of the United States

KEVIN MCCARTHY, SUPERINTENDENT, ELMIRA
CORRECTIONAL FACILITY,
Petitioner,

v.

PEDRO HERNANDEZ,
Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

REPLY BRIEF FOR PETITIONER

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March 19, 2026

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INTRODUCTION

As this Court recently confirmed, “AEDPA sharply limits federal review of habeas claims raised by state prisoners,” and summary relief is appropriate when a federal court orders “a new trial based on reasoning that depart[s] from what AEDPA prescribes.” *Klein v. Martin*, 146 S. Ct. 589, 593, 596 (2026) (per curiam). Hernandez’s brief in opposition confirms that the U.S. Court of Appeals for the Second Circuit ignored AEDPA’s “strict standards,” *id.* at 592, in overturning the conviction here based solely on the state trial court’s purportedly inadequate response to a jury note.

First, like the court of appeals, Hernandez fails to identify a single case from any court holding that federal law requires juries to apply the suppression ruling from *Missouri v. Seibert*, 542 U.S. 600 (2004). The absence of “clearly established Federal law, as determined by the Supreme Court,” 28 U.S.C. § 2254(d)(1), addressing “the specific question presented by this case” mandates summary reversal, *Lopez v. Smith*, 574 U.S. 1, 6 (2014).

Second, like the court of appeals, Hernandez also errs in asserting that he satisfied *Brecht*’s actual-prejudice standard and that “no fairminded jurist could find [any error here] to be immaterial” under AEDPA. *Martin*, 146 S. Ct. at 597. In particular, like the court of appeals, Hernandez ignores critical facts that supported the state appellate court’s harmless-error finding—contravening the deference required by AEDPA. *See id.* at 596-97.

To distract from these fundamental defects in the court of appeals’ decision, Hernandez makes a pitch

for his actual innocence (Opp.3-4) and baldly asserts that certain of his confessions violated *Seibert* (Opp.18-19). Neither claim is correct. There was in fact compelling evidence that Hernandez murdered Etan Patz; and there was no *Seibert* violation here because, as the state courts found, Hernandez was not in custody during his initial CCPO confession, and there was no evidence of a “*deliberate* two-step strategy” by police “to undermine the *Miranda* warnings”—an essential prerequisite under Justice Kennedy’s controlling concurrence. 542 U.S. at 622 (Kennedy, J., concurring) (emphasis added).

More fundamentally, however, the Second Circuit’s grant of habeas relief was not based on any finding of innocence or of an actual *Seibert* violation. Instead, it reversed a guilty verdict based on its conclusion that a response to a single jury note was so clearly wrong and so clearly prejudicial that it warranted the nullification of a five-month trial and the upending of the Patz family’s lives. AEDPA precludes such an enormous disruption of the state criminal process on such an inconsequential ground. This Court should accordingly summarily reverse the court of appeals’ decision, or grant this petition for a writ of certiorari.

ARGUMENT

I. Hernandez Fails to Identify Clearly Established Federal Law That Would Support His Claim of a Legal Error.

Like the Second Circuit, Hernandez insists that the state trial court’s response to the jury note failed to educate the jury about Justice Kennedy’s controlling concurrence in *Seibert* (Opp.21-22). This argument assumes that *Seibert* applies not only to

judges ruling on pretrial suppression motions—the procedural posture of *Seibert* itself, 542 U.S. at 606—but also to juries considering the voluntariness of confessions. But Hernandez does not cite a single decision from any federal court, let alone this Court, holding that juries must consider *Seibert* in their deliberations.

The complete absence of any supporting precedent is a far cry from the “clearly established Federal law, as determined by the Supreme Court,” that AEDPA requires before a state conviction may be overturned. 28 U.S.C. § 2254(d)(1). Hernandez’s attempts to avoid this basic defect are unavailing.

1. Hernandez’s most fundamental mistake is in construing the state trial court’s answer of “no” as “instructing the jury *incorrectly* about federal constitutional law” (Opp.17). Contrary to Hernandez’s characterization, the state trial court’s response was not a substantive interpretation of *Seibert*, but instead a description of the jury’s limited institutional role (Pet.15). As the trial court explicitly told the parties, in a passage that Hernandez does not even mention, its answer of “no” was intended to inform the jury that it was “not their function” to apply “the fruit of the poisonous tree doctrine” (App.283a-284a, 302a).¹ AEDPA forbids federal courts from disregarding “all the reasons . . . supporting the state court’s decision,” *Mays v. Hines*, 592 U.S. 385, 391 (2021), but Hernandez (like the

¹ The People reiterated on direct appeal that attenuation “is not a question properly submitted to a jury” (A2004), and the Appellate Division agreed that “no” was the correct response (App.254a).

Second Circuit) does just that by ignoring the state trial court's overt explanation for its answer.

The state court did not violate clearly established federal law in concluding that it was not the jury's function to consider the suppression issue presented by *Seibert*. As Hernandez concedes (Opp.22), there is no federal requirement that juries consider suppression issues at all (Pet.20). See *Lego v. Twomey*, 404 U.S. 477, 490 (1972). And this Court's precedents have only ever considered *Seibert* specifically in the context of pretrial suppression rulings *by a judge*. See *Bobby v. Dixon*, 565 U.S. 23, 26 (2011) (per curiam); *Seibert*, 542 U.S. at 606. The trial court's response here was thus consistent with clearly established federal law.

2. Hernandez is wrong to assert that *Seibert* nonetheless applied to the jury's deliberations in this case because New York has "ask[ed] its juries to determine voluntariness" (Opp.22). As the People have already explained (Pet.21), that argument ignores the fact that, under New York law, juries consider only discrete aspects of a confession's voluntariness—namely, whether a confession was the result of coercion or undue inducements, and whether law enforcement complied with *Miranda*'s procedural requirements (A1434-42). By contrast, as Hernandez concedes (Opp.22), New York does not ask juries to decide the question presented in *Seibert*—whether a prior unwarned statement taints a subsequent post-warning statement. The trial court's answer of "no" accurately reflected that state-law choice.

No precedent from this Court—or, indeed, any federal court—supports Hernandez's assumption that, "[o]nce a State chooses to vest juries with [the]

responsibility” to assess a confession’s voluntariness, then *every* “governing federal substantive standard[] must control the jury’s consideration” (Opp.22). To the contrary, many States are selective about the aspects of a confession’s voluntariness that they have chosen to submit to a jury (Pet.36). No “clearly established Federal law” provides that States must make an all-or-nothing choice in this area, which implicates “the States’ core power to enforce criminal law.” *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022); *see also Carter v. Illinois*, 329 U.S. 173, 175 (1946) (“the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure”).

Hernandez is also wrong to assert that this case is different because the jury purportedly asked an “explicit question” implicating *Seibert* (Opp.22; *see also* Opp.17). For one thing, the state trial and appellate courts reasonably interpreted the note differently because the jury was asking about not only law-enforcement confessions but also confessions to civilians, which would not be governed by *Seibert* at all (Pet.22-24). The court of appeals’ disregard of that interpretation would independently support summary reversal. *See Wetzel v. Lambert*, 565 U.S. 520, 524 (2012) (summarily reversing a grant of habeas relief when federal court “overlooked [a] determination of the state courts”).²

² This argument about the interpretation of the jury note is not “newfound” (Opp.23), but instead was expressly raised in the People’s brief in the court of appeals.(Brief for Appellee at 35-38, *Hernandez v. McIntosh*, No. 24-1816, Dkt. No. 41 (Jan. 14, 2025)).

More fundamentally, as Hernandez does not deny, no clearly established federal law requires a jury to be instructed on a legal question simply because it asks about one (Pet.22). It was entirely proper—and certainly not “beyond any possibility for fairminded disagreement,” *White v. Woodall*, 572 U.S. 415, 421 (2014) (quotation marks omitted)—for the trial court to answer in a way that would convey to the jury that its question referenced a legal issue that was not their “function” to decide.

3. Finally, Hernandez is wrong to claim that the People conceded any dispositive issue here. In particular, the People did not “concede[] below . . . that habeas relief is appropriate where a jury instruction misstates applicable federal law” (Opp.2) (quotation marks omitted). The referenced portion of the People’s brief *assumed* that federal law applied to the jury’s deliberations and argued that the state trial court’s response did not misapply *Seibert* (Brief for Appellee, *supra* n.2, at 35-28). But Hernandez omits the fact that the People also made the more fundamental argument that is the basis for the current petition: namely, that federal law did *not* apply because “there is no freestanding federal right to state-court jury instructions that exhaustively and precisely detail the nuances of sometimes complex federal constitutional rules,” including *Seibert* (*id.* at 39-40; *see also id.* at 44 (“*Seibert* says nothing about how to interpret or respond to [this] jury’s request to ‘explain’”)).

The Second Circuit expressly rejected the People’s argument, holding that “[t]he rule laid out in *Seibert* is relevant not only to a court making admissibility determinations, but also to jurors who are deciding whether to consider such statements or to set them

aside as involuntary” (App.30a). Because no precedent from this Court clearly establishes this proposition, summary reversal is warranted.

II. Hernandez’s Harmless-Error Arguments Are Clear Misapplications of *Brecht* and AEDPA.

As the People have explained (Pet.24-35), any error in the trial court’s response to the jury note would still not support habeas relief because there was no basis for finding actual prejudice. Under *Brecht*, the jury likely did not consider the trial court’s response at all in its deliberations; and under AEDPA, “the record provides strong support that [Hernandez] would have been convicted anyway” in light of the other evidence of his guilt, *Martin*, 145 S. Ct. at 597 (quotation marks omitted). Hernandez’s arguments to the contrary are unpersuasive.

1. Hernandez does not dispute that, under *Brecht*, any *Seibert* “error” in the trial court’s response could not have had a “substantial and injurious effect or influence” on the jury verdict unless the jury first found that his initial CCPO confession was the product of a deliberate *Miranda* violation. The Second Circuit never so much as discussed, let alone decided, if that prerequisite was met—even though the state courts expressly found that there was no *Miranda* violation because Hernandez was not in custody (Pet.33-35).³

³ Had the court considered these issues, it would have been bound by the findings supporting the Appellate Division’s custody ruling (Pet.33-34). 28 U.S.C. § 2254(e)(1); *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005). Hernandez is thus mistaken in

(Continued...)

Brecht “requires much more than a reasonable possibility that the result of the [trial] would have been different.” *Davis v. Ayala*, 576 U.S. 257, 276 (2015). The fact that the jury sent a note asking how to treat Hernandez’s post-*Miranda* confessions “if” they found the first CCPO confession involuntary (App.281a) confirms—as Hernandez’s trial counsel acknowledged—that the jury “still [had not] made a decision yet” on the voluntariness of that confession (Pet.33). And the fact that no court has found a *Miranda* violation in the initial CCPO confession (because Hernandez was not in custody) (Pet.34) undercuts any basis for the Second Circuit to harbor “grave doubt” about whether the jury would have reached the opposite conclusion, *Brown v. Davenport*, 596 U.S. 118, 136 (2022).

Hernandez is wrong to assert that the People forfeited this argument (Opp.27). To the contrary, the People expressly argued below that the trial court’s response could have prejudiced Hernandez only if it was reasonably likely that the jury found “as a threshold matter” that his first CCPO confession was the result of a deliberate *Miranda* violation, but no such likelihood existed in light of the state courts’ finding that Hernandez was not in custody (Brief for Appellee, *supra* n.2, at 40-42). Moreover, the People never conceded that an involuntariness finding as to the first CCPO confession “would trigger *Seibert*” (Opp.24). The referenced argument from the People’s district court briefing was describing New York law, which is more defendant-friendly than *Seibert* because it does not require any showing of

asserting that “[i]t does not matter that the state courts held [his] initial interrogation to be non-custodial” (Opp.31 n.5).

deliberateness on the part of law enforcement. See *Richardson v. Capra*, 2023 WL 2601895, at *9 (S.D.N.Y. Mar. 22, 2023), *aff'd*, 2024 WL 2161008 (2d Cir. May 14, 2024). And even under New York law, the People have never agreed that there was any basis to suppress (or for the jury to reject) Hernandez’s confessions to the ADA or to civilians.

Hernandez is also wrong to assert that the Second Circuit’s *Brecht* ruling was supported by evidence of a law-enforcement “tactical plan” to deliberately withhold *Miranda* warnings and not videotape the interview until he had confessed (Opp.24, 28 n.2). The “tactical plan” discussed at trial was a document—given to defense counsel—that listed the assignments for various detectives on May 23, 2012 (SA608-09). Notably, Detective Ramirez testified that during a meeting before Hernandez’s initial interview he did not “hear anyone say” that the interview “would be recorded, once the [*Miranda*] rights were being given” (SA611-12). This evidence was so far from being suspicious that defense counsel never argued—either at the suppression hearing or during the trial—that the police had acted “in a calculated way to undermine the *Miranda* warning.” *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). That claim is a post hoc characterization that is unsupported by the record and that accordingly cannot support the Second Circuit’s *Brecht* analysis.

2. Hernandez also missteps in attacking the Appellate Division’s harmless-error ruling (Opp.28-29). The Appellate Division found that Hernandez’s guilt would have been established by his fulsome confession to the ADA as well as his multiple confessions to civilians (App.254a-255a). As this Court recently confirmed, habeas relief can be

granted only if “every fairminded jurist” would find such additional evidence insufficient. *Martin*, 146 S. Ct. at 598. Hernandez has not come close to meeting this stringent standard.

First, Hernandez deems it “conjecture” or “speculation” that the jury would have found Hernandez’s confession to the ADA to be “‘sufficiently attenuated’ from the earlier, unwarned confessions” (Opp.29, 31). But the Appellate Division found “strong evidence” of attenuation (App.254a), and that finding “was supported by the record,” *Gentry*, 540 U.S. at 6 (see App.98a-99a). In light of that record support, “a fairminded jurist could easily conclude” that the jury would have deemed the confession to the ADA to be attenuated from the prior CCPO confessions. *Martin*, 146 S. Ct. at 599.

Like the court of appeals, Hernandez’s conclusory summary of the record of attenuation (Opp.30) omits critical facts. For example:

- When Hernandez began his interview at the District Attorney’s Office, he had not been questioned about this case for nearly 11 hours.
- During that time, he was driven more than 90 miles from the CCPO to Manhattan.
- The detectives who questioned him at the CCPO were not present for his interview with the ADA.
- At the outset of that interview, the ADA said that they were starting “brand new,” and their conversation had “nothing at all to do” with the questioning at the CCPO.

- In addition to sleeping for nearly three hours before the interview, Hernandez slept for another two hours during one of two breaks.

(Pet.10-11, 25-27).

That some facts may have pointed in the opposite direction (Opp.30-31) is of no moment. “The question is whether a fairminded jurist could take a different view,” *Shinn v. Kayer*, 592 U.S. 111, 121 (2020), and conclude that Hernandez would have “appreciate[d] that the interrogation ha[d] taken a new turn,” *Seibert*, 542 U.S. at 622. Here, a reasonable jurist could readily reach a conclusion in light of the extensive evidence of attenuation that was improperly ignored by both Hernandez and the Second Circuit. *See Martin*, 146 S. Ct. at 596 (federal court has obligation to consider “all the reasons and evidence supporting the state court’s decision”) (quotation marks omitted).

Second, Hernandez asserts that he may not have been convicted even if the jury had considered his confession to the ADA (Opp.31), but that argument “discount[s] the strength of the evidence against [him].” *Martin*, 146 S. Ct. at 598. There is no record support for his conclusory assertion here that the details he provided in his confession to the ADA were either fed to him or were simply pieces of “neutral, unremarkable information” (Opp.32). To the contrary, as the People have explained, Hernandez volunteered striking details to the ADA that law enforcement had not known about ahead of time and that were subsequently corroborated by other sources (Pet.11, 27).

In addition, Hernandez’s civilian confessions would have provided further support for his guilt. Although Hernandez now claims that the civilian confessions were too dissimilar to be corroborative (Opp.33), that argument reflects the type of *de novo* rebalancing of the weight of the evidence that this Court has specifically criticized as precluded by AEDPA. *See Kayer*, 592 U.S. at 119. Here, even if there were some differences, there was sufficient overlap—especially in the key details—for a fairminded jurist to agree with the Appellate Division’s finding that the civilian confessions were “generally similar to” the law-enforcement confessions and that any differences “were sufficiently explained” (Pet. App.252a-253a).

In sum, considering all of the evidence supporting Hernandez’s guilt, a fairminded jurist could conclude that the Appellate Division’s harmless-error ruling was not so “indefensible,” *Dunn v. Reeves*, 594 U.S. 731, 733 (2021), “egregious,” *Dixon*, 565 U.S. at 27, or “obviously wrong,” *Kayer*, 592 U.S. at 118, as to constitute an unreasonable application of federal law. Summary reversal is appropriate.

CONCLUSION

This Court should summarily reverse the court of appeals' decision, or grant the petition for a writ of certiorari.

Respectfully submitted,

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